U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 02 February 2006

BALCA Case No.: 2004-INA-95
ETA Case No.: P2000-CA-09508880

In the Matter of:

STAFFING SERVICES,
Employer,

on behalf of

JUAN BARAJAS-JIMINEZ,
Alien.

Appearance: W. Kenneth Teebken, Esquire
La Marida, California
For the Employer

Certifying Officer: Martin Rios
San Francisco, California

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations.[1] We base our decision on the record upon which the CO denied certification and

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On January 13, 2000, the Employer, Staffing Services, filed an application for labor certification to enable the Alien, Juan Barajas-Jiminez, to fill the position of "Stacker," which was classified by the Job Service as "Material Handler." (AF 131). The stated requirement, as initially set forth on the application, was two years of experience in the job offered. (AF 131).

In a Notice of Findings ("NOF") issued on October 31, 2003, the CO proposed to deny certification on the following grounds: 1) the two year experience requirement is unduly restrictive, because it exceeds the Specific Vocational Preparation ("SVP") level for the position (*i.e.,* one month up to and including three months); and 2) the Job Service Office sent a total of 34 resumes to the Employer, who failed to provide sufficient evidence that these qualified U.S. applicants were contacted in a timely manner, if at all. (AF 126-129).

In a rebuttal letter which is misdated as "December 3, 2002,"[2] the Employer elected to amend the restrictive requirement, and require only three months of experience in the job offered. Furthermore, the Employer provided a draft advertisement without the restrictive requirement. (AF 115; *see also* AF 131, Item 14, as amended). In addition, the Employer set forth the results of his initial recruitment efforts, wherein none of the 34 U.S. applicants referred to the Employer was hired. (AF 117-122). By letter dated January 9, 2003, the CO remanded this matter to the State Job Office based upon the Employer's willingness to amend the terms and conditions of the position and re-recruit. (AF 114).

Subsequently, the CO issued another NOF dated August 18, 2003, wherein the CO proposed to deny certification on the grounds that the Employer had failed to provide sufficient evidence that it had made a timely, good-faith recruitment effort. (AF 68-70). The Employer

[2] The rebuttal letter contains signatures by the Employer's counsel and "David Zahler," who is elsewhere identified as the Employer's President (AF 132), dated "12-5-02" and "12-9-02," respectively. (AF 115). However, the confusion with the dates is readily explained by the Employer counsel's letter, dated December 5, 2002, in which he requested an extension because of the unavailability of the Employer's authorized agent (AF 124), as well as a supporting statement by "Pete Morales". (AF 125). Moreover, the CO granted the Employer's request and granted an extension until January 8, 2003. (AF 123). Accordingly, the Employer's initial rebuttal was timely filed.

submitted its rebuttal on or about September 18, 2003. (AF 27-67). The CO found the rebuttal to be unpersuasive and issued a Final Determination dated October 24, 2003, denying certification on the same grounds. (AF 25-26). On November 20, 2003, the Employer filed a Request for Review. (AF 1-24). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals ("Board"). Pursuant to our "Notice of Docketing and Order Requiring Statement of Position or Legal Brief" dated April 7, 2004, the Employer's counsel filed a supporting brief postmarked April 26, 2004.

DISCUSSION

An employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications.

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good faith requirement is implicit. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988); *Tilden Car Care Center*, 1995-INA-88 (Jan. 27, 1997). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

As outlined above, in the initial NOF, the CO questioned the Employer's recruitment effort because it failed to hire 34 seemingly qualified U.S. applicants. (AF 128). Following the Employer's re-recruitment effort, the Employer received 14 additional referrals. However, the Employer also did not hire any of these seemingly qualified U.S. applicants either. Accordingly, in the second NOF, the CO stated in pertinent part:

> Finding: Job Service Office sent resumes to you on April 10. There is insufficient evidence employer's effort to contact the qualified applicants took place: you report all 14 were unavailable or not interested in the job (the same

> result you had for 34 qualified applicants to your previous recruitment effort). Given this showing of apparent lack of good faith in your recruitment effort, we need more substantial evidence of attempts to timely contact the applicants.
>
> Positive contact efforts include both attempts in writing (supported by dated return receipts) and by telephone (supported by phone bills). The evidence in hand is not convincing your efforts to contact applicants took place at all, or "as early as possible" as EDD had directed. The evidence also shows you did not conduct a good-faith recruitment effort. The recruitment is considered tardy and incomplete.
>
> Corrective Action: If you contend this conclusion is inaccurate, submit a rebuttal addressing the issues and giving details of your attempt(s) to interview U.S. applicants.

(AF 69).

In its rebuttal dated September 18, 2003, the Employer represented that "David Zahler-President" had contacted each of the 14 U.S. applicants by "Phone U.S. Mail." Of these 14 U.S. applicants, 8 purportedly "confirmed" their appointment "but did not show up nor call to reschedule" (*i.e.,* U.S. applicants Gonzales, Finn, Nunez, Ocampo, Venegas, Hernandez, Wood, and Perez). Of the 6 remaining U.S. applicants, Mr. Perez reportedly "did show up but wanted more money;" Mr. Dennis "was interested in a part-time job;" Mr. Orozco "verbally stated he was not interested in scheduling an appointment;" Mr. Anderson "did show up for the interview, but was interested in supervising position in a warehouse;" Mr. Harris "confirmed appointment, but he wanted more money then [sic] the position was offering;" and, Mr. Nichol "called on 04/23/03 to cancel his appointment." (AF 28-30).

In addition to the statement of David Zahler, the Employer submitted copies of letters dated April 23, 2003 to each of the 14 applicants, which listed a scheduled interview time on April 28, 2003, with instructions to the U.S. applicants to confirm the appointment or call to reschedule or cancel such appointment. (AF 33-46). Furthermore, the Employer submitted phone records which, in part, indicate that there were brief phone calls to some of the U.S. applicants. (AF 48-49). Similarly, the Employer had previously stated in its initial report of recruitment results that none of the 34 U.S. applicants which had been referred earlier, were interested in the position. Furthermore, the Employer had previously represented that many of the 34 U.S. applicants had also failed to show up or reschedule their interviews. (AF 136-139).

In the Final Determination, the CO found the Employer's rebuttal to be unpersuasive, stating in pertinent part:

> INSUFFICIENT RECRUITMENT EFFORT
>
> NOF questioned the good-faith of your effort to recruit U.S. workers. You rebut with some additional information about your contact efforts.
>
> However, you submit no **documentation** to corroborate the date you supposedly sent the letters. Not all the telephone numbers could be matched to applicants; those that could showed calls to establish applicant availability lasting no more than a minute. The calls were made two weeks or more after resumes had been sent to you.
>
> The evidence is not convincing you made a good-faith effort to recruit the 14 applicants to your more recent recruitment; we have already noted you had not made a good-faith effort to recruit the 34 qualified applicants to your previous recruitment. This petition cannot be approved.

(AF 26). We agree with the CO.

In the present case, the Employer alleges that it contacted all 48 U.S. applicants, and that *none* are interested in the job opportunity. (AF 136-139; AF 73-74). The Employer's assertion is highly improbable and stretches credulity.[3] On its face, it suggests that the Employer either did not contact the U.S. applicants in a timely manner, and/or that it took actions to discourage U.S. applicants from pursuing the job opportunity. Accordingly, the CO requested specific documentary evidence to substantiate the Employer's assertions, including "attempts in writing (supported by dated return receipts) and by telephone (supported by phone bills)." (AF 128; AF 69). However, the Employer's supporting documentation on rebuttal is limited to phone records, which only partially support the Employer's assertion regarding some of the U.S. applicants; and copies of *uncertified* letters to the 14 more recent U.S. applicants *without any dated return receipts*.

It is well settled that an employer carries the burden to substantiate its assertion that it made contact promptly with potentially qualified U.S. applicants. *See e.g. Flamingo Electroplating, Inc.,* 1990-INA-495 (Dec. 23, 1991); *Venk Jewelry,* 1989-INA-348 (July 30,

[3] We also take administrative-judicial notice that the same Employer filed a labor certification application on behalf of a different alien (*i.e.,* Jose Salcedo-Velazquez), in which the Employer also reported that none of numerous U.S. applicants were interested in the job opportunity set forth therein. (*See* 2004-INA-102).

1990); *Harvey Studios,* 1988-INA-430 (Oct. 25, 1989). Based upon the facts of this case, we find that the Employer has failed to meet its burden and/or to provide the documentation reasonably requested by the CO in the two NOFs. Accordingly, we find that labor certification was properly denied.[4]

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel:

A

Todd R. Smyth
Secretary of the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.

[4] The regulations preclude consideration of evidence which was not "within the record upon which the denial of labor certification was based." 20 C.F.R. § 656.24(b)(4); *Fried Rice King Chinese Restaurant*, 1987-INA-518 (Feb. 7, 1989)(*en banc*). Therefore, the "Declaration of David Zahler," dated November 6, 2003, which was submitted with the request for review (AF 6), and as a supporting exhibit of the Employer's brief, is not properly before us.